



ICLG

The International Comparative Legal Guide to:

Trade Marks 2019

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1 Relevant Authorities and Legislation

1.1 What is the relevant trade mark authority in your jurisdiction?

The relevant trade mark authorities are: the Ministry of Economic Development and Trade of Ukraine (MEDTU), which is the central body of executive power on issues of the legal protection of intellectual property; and the Ukrainian Institute of Intellectual Property (UA PTO), a State Enterprise managed by the MEDTU which, *inter alia*, conducts examination of the filed trade mark applications and handles other related matters.

1.2 What is the relevant trade mark legislation in your jurisdiction?

The relevant trade mark legislation includes the following:

I. National legislation

- the Constitution of Ukraine, 1996;
- the Civil Code of Ukraine, 2003;
- the Law of Ukraine “On Protection of Rights to Marks for Goods and Services”, 1993 (Trade Mark Law); and
- the Rules on Drafting, Filing and Consideration of Trade Mark Applications, approved by Order of the State Department for Intellectual Property (Rules), 1995.

II. International legislation

- the Ukraine–European Union Association Agreement, 2014;
- the Paris Convention for the Protection of Industrial Property, 1883–1967 (Paris Convention);
- the Madrid Agreement Concerning the International Registration of Marks, 1891–1967 (Madrid Agreement);
- the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957–1977 (Nice Agreement);
- the Vienna Classification, 1973;
- the Nairobi Treaty on the Protection of the Olympic Symbol, 1981;
- the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994;
- the Trademark Law Treaty, 1994; and
- the Singapore Treaty on the Law of Trademarks, 2006.

2 Application for a Trade Mark

2.1 What can be registered as a trade mark?

The object of a mark may be any sign or any combination of signs. Such signs may be, among other, words, including personal names, letters, numerals, pictorial elements, three-dimensional marks, sound marks, colours and combinations of colours, as well as any combination of such signs.

Sound marks, colours and their combinations are registered in the event of the technical possibility of their entry in the Trade Mark Register and publication of information regarding their registration.

2.2 What cannot be registered as a trade mark?

- I. According to the Ukrainian Trade Mark Law, legal protection in Ukraine is not granted to designations that represent or imitate:
 - State armorial bearings, flags, and other State emblems (symbols);
 - official names of States;
 - symbols and abbreviated or full names of international intergovernmental organisations;
 - official signs and hallmarks indicating control and warranty, assay marks, seals; and
 - awards and other decorations.

Such symbols may be included in a mark as elements that are not protected, provided that the consent of the relevant authorised body or the proprietors of the mentioned signs is obtained.
- II. Legal protection is not granted to designations that:
 - are usually devoid of any distinctive character and have not obtained distinctiveness as a result of their use;
 - consist exclusively of signs that are commonly used as the signs of goods and services of a certain kind;
 - consist exclusively of signs or data that are descriptive while being used for goods and services defined in the application or with respect to them; in particular, signs or data that indicate kind, quality, composition, quantity, properties, purposes, value of goods and services, place and time of manufacturing or sale of goods or rendering of services;
 - are deceptive or liable to mislead as to goods, services, or the person that produces a good or renders a service;

- consist exclusively of signs that constitute commonly used symbols and terms; and
- solely reflect the form caused by the natural state of goods, or by the necessity to obtain a specific technical result, or the form that imparts a significant value to a product.

The abovementioned signs (except signs which are deceptive or liable to mislead) may be included in a mark as non-protectable elements if they are not dominative in a trade mark.

- III. Legal protection will not be granted to marks that are identical or misleadingly similar to such an extent that they can be confused with:
- trade marks that were earlier registered or filed for registration in Ukraine on behalf of another person for identical or similar goods and services;
 - trade marks of other persons if these trade marks are protected without registration according to the international agreements to which Ukraine is a party; in particular, marks recognised as well-known marks according to Article 6-bis of the Paris Convention;
 - trade names/firm names that are known in Ukraine and belong to other persons who have acquired the right to the said names before the date of filing the application with respect to identical or similar goods and services;
 - qualified appellations of origin of goods (including spirits and alcoholic beverages) that are protected according to the Law of Ukraine On the Protection of Rights to Appellation of the Origin of Goods. The said signs may be used only as non-protected elements of marks of the persons who have the right to use the said appellations; and
 - conformity marks (Certification marks) that have been registered in the established order.
- IV. Legal protection will not be granted to designations that reproduce:
- industrial designs which are registered in Ukraine and belong to other persons;
 - titles of scientific, literary and artistic works known in Ukraine or quotations and characters from the said works, as well as the artistic works and their fragments, without the consent of copyright holders or their legal successors; and
 - surnames, first names, pseudonyms and their derivatives, portraits and facsimiles of persons known in Ukraine, without their consent.
- V. The object of the sign also cannot be:
- names or pseudonyms of persons holding leading positions in the Communist party (the position of the secretary of the district committee and above), the higher authorities and management of the USSR, the Ukrainian SSR (USSR), and other union or autonomous Soviet republics (except for cases related to the development of Ukrainian science and culture), or who worked in the Soviet bodies of State security; and
 - the names of the USSR, the Ukrainian SSR (USSR), and other constituent Soviet republics and their derivatives, names related to the activities of the Communist party, the establishment of the Soviet system in Ukraine or in separate administrative-territorial units, or the persecution of participants in the struggle for independence Ukraine in the 20th century.

- an image of the mark being claimed as a trade mark and a description thereof;
- a list of goods and/or services for which a mark should be registered, classified according to the current edition of the International Classification of Goods and Services under the Nice Agreement. The list of goods and/or services should be translated into Ukrainian within two months from the filing date;
- the number, date and country code of the previous application to the same trade mark or date of exhibition if conventional or exhibition priority is claimed according to the Paris Convention;
- a copy of the of the previous application with its Ukrainian translation or a document that confirms the demonstration of the mark at an exhibition (in the case that conventional or exhibition priority is claimed);
- a Power of Attorney for representation of the applicant's interests; and
- a document confirming payment of the official filing fee.

2.4 What is the general procedure for trade mark registration?

After the filing of a trade mark application, it passes two stages of examination:

I. Formal examination

During this stage, the UA PTO clarifies whether the filed application complies with the formal requirements of the Trade Mark Law, contains all the required information, checks the payment of the official filing fee (which has to be paid within two months from filing the application) and determines the filing date of the application. Then the claimed list of goods and/or services is examined for compliance with the current edition of the International Classification of Goods and Services under the Nice Agreement. If necessary, the examiner issues the relevant request. The applicant has to provide a response to the request within two months from its receipt, with a possible term extension of an additional six months.

If the application meets all the formal requirements, a conclusion of formal examination is issued and the application moves on to the stage of substantive examination.

II. Substantive examination

At this stage, the claimed mark is examined as to its conformity with the conditions for granting legal protection (absolute and relative grounds). If there are reasons to consider that the claimed mark does not meet fully or partially the requirements for granting legal protection, the UA PTO sends a grounded provisional refusal to the applicant with the proposition to give a motivated response thereto. The applicant has two months to reply to the provisional refusal, with a possibility to extend this term by an additional six months.

In the case that no grounds for refusal are found as a result of substantive examination and the claimed mark meets the criteria for granting legal protection, a decision on registration is issued.

Based on the grant of protection decision, and provided that the official registration fees are paid, a trade mark certificate is issued and general information about the registered trade mark is published in the official bulletin and on the UA PTO's website.

2.3 What information is needed to register a trade mark?

To register a trade mark in Ukraine, an application should be filed with the UA PTO, where the following information has to be stated:

- the name and address of the applicant(s) in the language of origin and their transliteration in Ukrainian Cyrillic characters;

2.5 How is a trade mark adequately represented?

The image of the mark whose registration is applied for is filed in the form of a photocopy or a print at a size of 8 × 8 cm.

If a three-dimensional mark is claimed, its image is submitted in such a perspective that allows the entire object to be visualised. In addition, images of all the necessary projections are submitted to ensure comprehensive imagination of the mark.

If a label is claimed as a trade mark, it is filed as an image of the mark, provided that its size does not exceed 14 × 14 cm.

Photocopies or prints should be contrastive, sharply defined and must be submitted in the colour (or combination of colours) as indicated in the application materials.

If a sound mark is filed for registration, it should be presented in the form of a phonogram.

If a colour or combination of colours are filed for registration as a trade mark, their prints are submitted with the surface on which they are applied.

2.6 How are goods and services described?

The goods and/or services for which the mark is intended to be registered should be clearly listed and grouped in accordance with the current edition of the International Classification of Goods and Services under the Nice Agreement. A Ukrainian translation of the list of goods and/or services has to be submitted to the UA PTO if it is filed in a foreign language. Multi-class applications are available according to the Trade Mark Law.

2.7 What territories (including dependents, colonies, etc.) are or can be covered by a trade mark in your jurisdiction?

A Ukrainian trade mark registration covers the entire territory of Ukraine.

2.8 Who can own a trade mark in your jurisdiction?

The owner of a trade mark may be a natural person or legal entity. Joint ownership is available.

2.9 Can a trade mark acquire distinctive character through use?

According to the Trade Mark Law, legal protection is not granted to marks that are usually devoid of any distinctive character and have not obtained such a character as a result of their use. Thus, a mark without inherent distinctive character can acquire distinctiveness through its extensive use. To prove that a trade mark has acquired distinctiveness, the relevant documents confirming its use prior to the filing date of an application should be submitted to the UA PTO.

2.10 How long on average does registration take?

Provided that no official actions and no objections by third parties are raised, the registration of a trade mark takes, on average, 14–18 months. If necessary, there is the possibility of an accelerated proceeding, which is subject to additional fee payment. In the event of the accelerated proceeding, the registration process is reduced to six to eight months.

2.11 What is the average cost of obtaining a trade mark in your jurisdiction?

The average cost for registration of a word, figurative or combined

trade mark in one class of the International Classification of Goods and Services in the name of one applicant will be about USD 245. An additional official fee in the amount of USD 20 should be paid in the event that a colour is claimed in the trade mark image.

Fees for the legal representation of an applicant by a trade mark attorney may need to be added to the aforementioned expenses.

2.12 Is there more than one route to obtaining a registration in your jurisdiction?

In order to obtain a trade mark registration in Ukraine, there is another route besides the local procedure described above; namely, designating Ukraine in an application for international trade mark registration as provided for by the Madrid System for the International Registration of Marks, which is governed by the Madrid Agreement and the Protocol relating to the Agreement.

2.13 Is a Power of Attorney needed?

According to the Trade Mark Law, foreign applicants residing or having a permanent location outside Ukraine exercise their rights in their relations with the relevant governmental authority through registered trade mark attorneys. Therefore, for representation of an applicant's interests before the UA PTO, a Power of Attorney is needed. In general, a trade mark application may be filed without a Power of Attorney upon its further submission to the UA PTO.

2.14 If so, does a Power of Attorney require notarisation and/or legalisation?

A Power of Attorney does not require notarisation and/or legalisation. However, it should be notarised in the case that it is executed by way of substitution.

2.15 How is priority claimed?

A priority of a previous application on the same mark may be claimed within six months following the filing date of the previous application to the relevant body of a Member State of the Paris Convention, provided that the priority on the previous application was not claimed earlier. A declaration of priority is filed during preparation of a trade mark application or within three months following the filing date of the application (a certified copy of the previous application and its Ukrainian translation should be submitted to the UA PTO within the said term as well).

Priority of a mark, which was used in an exhibit shown at official or officially recognised international exhibitions in the territory of a Member State of the Paris Convention, may be determined by the opening date of the exhibition, provided that the application is filed to the UA PTO within six months from the said date. A document that confirms demonstration of the mark at an exhibition should be submitted to the UA PTO within three months from the filing date of the application.

2.16 Does your jurisdiction recognise Collective or Certification marks?

Ukraine currently recognises Collective marks. If the applicant is an association that produces goods or provides services with common characteristics, the statute of the Collective mark containing the following information should be attached to the application:

- full name and address of the applicant entitled to registration of the Collective mark (according to the applicants' agreement);
- full name and address of the entities entitled to use a Collective mark; and
- terms of use of the Collective mark and information regarding the rights and duties of the association members in case of violations regarding use of the Collective mark.

Certification marks are not yet implemented in Ukraine.

3 Absolute Grounds for Refusal

3.1 What are the absolute grounds for refusal of registration?

Ukrainian legislation provides that legal protection in Ukraine is not granted to designations that:

- I. contradict the public order, principles of humanity and morality;
- II. represent or imitate:
 - State armorial bearings, flags, and other State emblems (symbols);
 - official names of States;
 - symbols and abbreviated or full names of international intergovernmental organisations;
 - official signs and hallmarks indicating control and warranty, assay marks, seals; or
 - awards and other decorations;
- III. are usually devoid of any distinctive character and have not obtained distinctiveness as a result of their use;
- IV. consist exclusively of signs that are commonly used as the signs of goods and services of a certain kind;
- V. consist exclusively of signs or data that are descriptive while being used for goods and services defined in the application or with respect to them; in particular, signs or data that indicate kind, quality, composition, quantity, properties, purposes, value of goods and services, the place and time of manufacturing or sale of goods or rendering of services;
- VI. are deceptive or liable to mislead as to goods, services, or the person that produces a good or renders a service;
- VII. consist exclusively of signs that constitute commonly used symbols and terms; or
- VIII. solely reflect the form caused by the natural state of goods, or by the necessity to obtain a specific technical result, or the form that imparts a significant value to a product.

3.2 What are the ways to overcome an absolute grounds objection?

To overcome a provisional refusal of trade mark registration based on absolute grounds, a motivated response should be filed to the UA PTO within two months from the date of receiving the relevant provisional refusal. This term may be extended by an additional six months. The reinstatement of the missed term for filing a response to a provisional refusal is also possible, provided the relevant petition is filed within six months after its expiration.

The arguments provided in the response to the provisional refusal are considered by the UA PTO and are taken into account when making a final decision on the application in question.

It is worth noting that:

- the signs mentioned in item II under question 3.1 may be included in a mark as elements that are not protected,

provided that the consent of the relevant authorised body or the proprietors of the mentioned signs is obtained; and

- the signs mentioned in items III, IV, V, VII, VIII under question 3.1 may be included in a mark as non-protectable elements if they are not dominative in a trade mark.

One of the main arguments for overcoming the provisional refusal on the absolute grounds (except for items I, VI and VIII) would be confirmation that the applied mark obtained distinctiveness as a result of its use in Ukraine.

3.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

A final decision on a trade mark application may be appealed by the applicant.

3.4 What is the route of appeal?

An applicant is entitled to appeal a final decision on a trade mark application to the court or to the Board of Appeals of the MEDTU within two months from the date of receiving the relevant decision.

The filed appeal against the final decision on the trade mark application is considered by the Board of Appeals within two months from the date of receiving the appeal and the document confirming payment of the respective official fee. The term for consideration of the appeal may be extended on the initiative of the applicant, but for no more than two months, provided that the relevant petition is filed and the official fee is paid with respect to the petition.

A Board of Appeals' decision may be appealed to the court within two months from the date of its receipt by the applicant.

4 Relative Grounds for Refusal

4.1 What are the relative grounds for refusal of registration?

- I. Legal protection will not be granted to marks that are identical or misleadingly similar to such an extent that they can be confused with:
 - trade marks that were earlier registered or filed for registration in Ukraine on behalf of another person for identical or similar goods and services;
 - trade marks of other persons if these trade marks are protected without registration according to the international agreements to which Ukraine is a party; in particular, marks recognised as well-known marks according to Article 6-bis of the Paris Convention;
 - trade names/firm names that are known in Ukraine and belong to other persons who have acquired the right to the said names before the date of filing the application with respect to identical or similar goods and services; or
 - qualified appellations of origin of goods.
- II. Legal protection will not be granted to designations that reproduce:
 - industrial designs which are registered in Ukraine and belong to other persons;
 - titles of scientific, literary and artistic works known in Ukraine or quotations and characters from the said works, as well as the artistic works and their fragments, without the consent of copyright holders or their legal successors; or

- surnames, first names, pseudonyms and their derivatives, portraits and facsimiles of persons known in Ukraine, without their consent.

4.2 Are there ways to overcome a relative grounds objection?

An applicant is entitled to file a motivated response to a provisional refusal of trade mark protection based on relative grounds within two months from the date of receiving the refusal. This term may be extended by an additional six months. The reinstatement of the missed term for filing a response to a provisional refusal is also possible, provided the relevant petition is filed within six months after its expiration.

The reply to the provisional refusal should contain the arguments in favour of a trade mark registration. The arguments provided in the response to the provisional refusal are considered by the UA PTO and are taken into account when making a final decision on the application in question.

In most cases, the documents confirming active use of the trade mark in Ukraine are considered as a strong additional argument in favour of the trade mark's registration.

4.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

A final decision on a trade mark application may be appealed by the applicant.

4.4 What is the route of appeal?

An applicant is entitled to appeal a final decision on a trade mark application to the court or to the Board of Appeals of the MEDTU within two months from the date of receiving the relevant decision.

The filed appeal against the final decision on the trade mark application is considered by the Board of Appeals within two months from the date of receiving the appeal and the document confirming payment of the respective official fee. The term for consideration of the appeal may be extended on the initiative of the applicant, but for no more than two months, provided that the relevant petition is filed and the official fee is paid with respect to the petition.

A Board of Appeals' decision may be appealed to the court within two months from the date of its receipt by the applicant.

5 Opposition

5.1 On what grounds can a trade mark be opposed?

The filed application for a trade mark registration may be opposed on the absolute and relative grounds mentioned in sections 3 and 4.

5.2 Who can oppose the registration of a trade mark in your jurisdiction?

According to the Trade Mark Law, any person is entitled to file a grounded opposition to the UA PTO in respect of the unconformity of the sign presented in the application with the requirements of granting the legal protection according to the present Law. Submission of the opposition is subject to the payment of the official fee.

5.3 What is the procedure for opposition?

The opposition should be filed to the UA PTO no later than five days prior to the date of a final decision on the application. With intent to meet the needs of the interested parties in filing the oppositions, in 2018 the UA PTO launched free online public access to all the trade mark applications filed after August 1, 2018 where the official filing fee has been paid and the filing date has been determined.

After the opposition is filed, the UA PTO sends its copy to the applicant. The applicant is entitled to submit an opinion on the arguments stated in the opposition within two months following receipt thereof. The applicant may decline the opposition and leave the application unchanged, make amendments to the application, or withdraw it.

The results of the opposition consideration are presented in the UA PTO's decision on the application. The copy of such a decision is sent to the person who submitted the opposition.

The UA PTO's decision may be appealed to the court or the Board of Appeals.

6 Registration

6.1 What happens when a trade mark is granted registration?

As a result of a successfully completed examination, a decision on registration of a trade mark is issued and sent to the applicant.

The applicant has to pay official registration and publication fees within three months from the date of receiving the decision. If necessary, the term for payment of the official fees may be extended by an additional six months, provided that the relevant petition is submitted to the UA PTO before the expiration of the set term. The reinstatement of the missed term is also possible if the relevant petition is filed within six months after its expiration.

Based on the official registration fees being paid, the MEDTU makes a trade mark registration and publishes the relevant data in the official bulletin and online register. The registration certificate is granted within a month from the registration of the trade mark.

6.2 From which date following application do an applicant's trade mark rights commence?

The rights deriving from a trade mark registration certificate are effective from the filing date of an application.

6.3 What is the term of a trade mark?

The validity period of the trade mark registration certificate is 10 years from the date of filing an application.

6.4 How is a trade mark renewed?

The validity period of the trade mark registration certificate may be renewed for 10 years each time at the request of the trade mark owner, provided that the respective fee is paid (approximately USD 110 per class and USD 11 per additional class).

7 Registrable Transactions

7.1 Can an individual register the assignment of a trade mark?

According to the Ukrainian legislation, registration of a trade mark assignment agreement is mandatory. The assignor or assignee is entitled to apply for registration of a trade mark assignment with the MEDTU. The assignment registration request should be filed by the representative in the case that the trade mark is assigned to a non-resident of Ukraine. Registration of the trade mark assignment agreement is subject to payment of the official fee, which amounts to approximately USD 22.

For registration of a trade mark assignment, an assignment agreement or notarised extract from the agreement, a Power of Attorney (if necessary) and confirmation of the official fee payment should be filed to the MEDTU along with the relevant request.

Registration of a trade mark assignment is not allowed if it may cause the deception of a consumer with respect to goods and services, or of the person manufacturing goods or rendering services.

7.2 Are there different types of assignment?

A trade mark right can be assigned in total or with respect to some goods and/or services.

7.3 Can an individual register the licensing of a trade mark?

It is possible to register a licence agreement. However, registration of the licence agreement is not mandatory.

The licensor or licensee is entitled to apply for the registration of a licence agreement with the MEDTU. The registration of a licence agreement is subject to the official fee payment, which amounts to approximately USD 15.

For registration of a licence agreement, the following documents should be filed to the MEDTU along with the relevant request:

- agreement or notarised extract from the agreement;
- Power of Attorney (if necessary); and
- confirmation of the official fee payment.

Furthermore, in order to be registered, the licence agreement or an extract thereof should contain a condition that the quality of goods and services manufactured or provided under a licence agreement may not be lower than the quality of the goods and services of the trade mark owner, and that the latter will exercise control over fulfilment of this condition.

7.4 Are there different types of licence?

A trade mark owner may issue to any person an exclusive, non-exclusive or sole licence for the use of a registered mark.

An exclusive licence is issued to only one licensee and excludes the possibility for the licensor to use the trade mark in a field that is restricted by this licence and to grant licences to other entities.

A non-exclusive licence does not exclude the possibility of the licensor using the trade mark in a field that is restricted by this licence and granting licences to other entities.

A sole licence is issued to only one licensee and excludes the possibility for the licensor to grant the licences to other entities in the area that is restricted by this licence; however, this does not rule out the possibility of use of the trade mark by the licensor.

A licensee using the mark based on the licence agreement may issue a licence to use the mark to a third party if the relevant power is prescribed by the licence agreement.

7.5 Can a trade mark licensee sue for infringement?

A trade mark licensee can sue for trade mark infringement provided that the relevant consent has been given by the trade mark owner.

7.6 Are quality control clauses necessary in a licence?

The Trade Mark Law prescribes that the licence agreement should contain a provision that the quality of goods or services manufactured or rendered according to the licence agreement will not be lower than the quality of goods and services provided by the trade mark owner. The trade mark owner controls the fulfilment of the said provision.

7.7 Can an individual register a security interest under a trade mark?

Yes, a security interest under a trade mark can be registered in the relevant State register.

7.8 Are there different types of security interest?

There are both private (based on agreement conditions) and public (based on a court or enforcement agency decision or the legislative provision) types of security interest.

8 Revocation

8.1 What are the grounds for revocation of a trade mark?

There are the following grounds for the court's revocation of a trade mark registration:

- a mark has been transformed into a sign that became commonly used as a sign for goods and services of a certain type after the filing date of the application; and
- a mark is not used in Ukraine fully or with respect to a part of goods and services listed in the trade mark certificate within five years from the date of publishing the information on granting the certificate or from another date after the publication date.

Moreover, a trade mark registration is revoked automatically in case of the missed term for payment of the relevant official renewal fee.

8.2 What is the procedure for revocation of a trade mark?

For the court's revocation of the trade mark, any interested party should initiate a court proceeding against the owner of the disputed registration and the MEDTU (as the relevant governmental authority administering the Trade Mark Register).

For proving the non-use of the disputed mark, a claimant should conduct a non-use investigation prior to filing a claim.

8.3 Who can commence revocation proceedings?

Any person or entity is entitled to commence a revocation proceeding, provided that the evidence of the infringed rights of the claimant by the disputed registration is submitted to the court.

8.4 What grounds of defence can be raised to a revocation action?

In the case that a revocation action is based on the ground that the disputed mark has been transformed into a sign that became commonly used as a sign for goods and services of a certain type, the trade mark owner may use the following arguments:

- initiate conducting of an examination by the certified expert or request an additional forensic examination; and/or
- provide the court with evidence confirming that the disputed trade mark possesses distinctiveness and is associated by consumers with the trade mark owner.

If the revocation action is based on non-use grounds, the owner of the disputed trade mark can provide the court with the evidence confirming that the mark has been used within the period indicated by the plaintiff. For this purpose, any documents confirming the trade mark's use could be submitted to the court, for instance: simple copies of advertisements meant for use in Ukraine; brochures; copies of agreements; invoices for the supplied goods; documents related to use of the trade mark in exhibitions and other commercial activities, etc.

Moreover, according to the Trade Mark Law, a trade mark owner may provide the court with valid reasons for such non-use, namely:

- conditions that block the use of the mark independently of the will of the trade mark owner, such as the limitation of import of goods or other requirements for goods and services that are determined by the legislation; and/or
- the possibility of deception with respect to the person manufacturing the goods or rendering services, while the plaintiff or another person uses the mark for the goods and services for which revocation of the registration was initiated.

8.5 What is the route of appeal from a decision of revocation?

The owner of the revoked trade mark has a right to appeal a first instance court decision to the appeal court. A decision of the appeal court may be appealed in cassation.

9 Invalidity

9.1 What are the grounds for invalidity of a trade mark?

According to the Trade Mark Law, a trade mark certificate may be fully or partially invalidated by the court based on the following grounds:

- the registered mark does not meet the requirements for granting the legal protection;
- the registration certificate contains elements of the mark and goods and services that were not presented in the filed application; and
- the certificate was granted as the result of the filing of an application in infringement of the rights of other parties.

The invalidated certificate or its part are considered to be those that are out of effect from the filing date of the application.

9.2 What is the procedure for invalidation of a trade mark?

For the court to invalidate a trade mark, any interested party should initiate a court proceeding against the owner of the disputed registration and the MEDTU (as the relevant governmental authority administering the Trade Mark Register).

The parties submit to the court their argumentation and evidence in support thereof. With intent to clarify the stated claims, a forensic examination may be appointed.

As a consequence of the court consideration, the court passes a judgment.

9.3 Who can commence invalidation proceedings?

Any person or entity is entitled to commence invalidation proceedings provided that the evidence of the infringed rights of the plaintiff by the disputed registration is submitted to the court (e.g. the disputed trade mark is misleadingly similar to the plaintiff's earlier registered trade mark).

9.4 What grounds of defence can be raised to an invalidation action?

In case of actions based on absolute grounds, the defendant may provide the court with the grounded argumentation that there are no legal reasons to apply the stated absolute grounds (e.g. evidence that the disputed trade mark is not descriptive). To defend against actions based on lack of distinctiveness, the relevant poll results may be submitted to the court.

In case of actions based on relative grounds (e.g. similarity with the earlier registered mark), the defendant may argue that the disputed mark is not similar to such extent that it can be confused with the earlier registered trade mark. For this purpose, the defendant may submit a conclusion by a certified expert. Moreover, it is possible to lodge a counterclaim for cancellation of the opposed registration.

9.5 What is the route of appeal from a decision of invalidity?

The owner of the invalidated trade mark has a right to appeal a first instance court decision to the appeal court. A decision of the appeal court may be appealed in cassation.

10 Trade Mark Enforcement

10.1 How and before what tribunals can a trade mark be enforced against an infringer?

The manner and court by which a trade mark is enforced depends on the trial participants, namely:

- Before the commercial court of the infringer's location, in the case that all the trial participants are legal entities and/or private entrepreneurs.
- Before the civil court at the defendant's location or the location of the damages caused, in the case that at least one of the trial participants is a natural person.

To initiate a lawsuit, a plaintiff should file a legal action to the relevant court.

10.2 What are the key pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

As a matter of pre-trial settlement of the dispute, a cease-and-desist letter can be used by the rights holder. It usually takes about two months to reveal whether the sent letter is effective or not in the particular case.

As to the court proceeding, consideration of the case in the first instance court usually lasts about four to eight months. Consideration of the case in the appeal court and the court of cassation takes approximately four to seven months.

10.3 Are (i) preliminary, and (ii) final injunctions available and if so on what basis in each case?

Preliminary injunctions are provided by all the Ukrainian procedural codes and may be applied by the court in the case that non-use thereof may have resulted in impossibility of a court decision being executed.

Final injunctions are not prescribed by the Ukrainian legislation.

10.4 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?

A party to an action may be compelled to disclose relevant information, documents or materials to its adversary based on the court ruling, which may be, *inter alia*, initiated by the adversary.

10.5 Are submissions or evidence presented in writing or orally and is there any potential for cross-examination of witnesses?

All the submissions and evidence should be presented to the court in written form. The trial participants are entitled to present oral motions and give oral comments.

Witness testimony is prescribed by the Ukrainian legislation. When it comes to examination of witnesses, the court and all the trial participants can pose questions to the witness related the matter. However, the cross-examination of witnesses is not available in commercial proceedings; it is only available in criminal court proceedings.

10.6 Can infringement proceedings be stayed pending resolution of validity in another court or the Intellectual Property Office?

An infringement proceeding can be stayed pending resolution of validity in another court case if the resolution of validity relates to intellectual property rights on which the infringing claim is based.

10.7 After what period is a claim for trade mark infringement time-barred?

The limitation of actions for filing a lawsuit is three years from the date on which the plaintiff became aware or should have known of the rights infringement. The missed term may be renewed provided that the plaintiff submits a grounded reason for not being able to file a lawsuit within the prescribed period.

10.8 Are there criminal liabilities for trade mark infringement?

There are the following criminal liabilities for trade mark infringement prescribed by the Criminal Code of Ukraine:

- penalty; and
- deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years or without such a term.

It is worth noting that the criminal liability arises only if damages caused by the infringement exceed approximately USD 615.

10.9 If so, who can pursue a criminal prosecution?

Taking into consideration that intellectual property rights to a trade mark are private rights, it is a rights holder or licence holder who is entitled to pursue a criminal prosecution of the infringer.

10.10 What, if any, are the provisions for unauthorised threats of trade mark infringement?

Ukrainian legislation does not contain specific provisions relating to unauthorised threats of trade mark infringement.

Nevertheless, the local laws ensure a viable mechanism of protection of honour, dignity and business reputation, so any business entity may defend the violated rights in court.

Moreover, Ukrainian competition legislation provides for protection against discreditation and libel.

11 Defences to Infringement

11.1 What grounds of defence can be raised by way of non-infringement to a claim of trade mark infringement?

The following grounds of defence to a claim of trade mark infringement can be used by a defendant depending on the list of claims:

- the used trade mark is not similar to such an extent that it can be confused with the plaintiff's trade mark and/or the goods and/or services are not homogeneous;
- non-use of the plaintiff's mark by the defendant;
- the plaintiff's mark was not applied on the defendant's goods, package label or other item attached to the goods;
- the goods marked with a disputed mark were not stored for subsequent offering for sale by the defendant;
- the goods marked with a disputed mark were not offered for sale, import or export by the defendant;
- the disputed mark was not used by the defendant while offering or rendering any service for which the plaintiff's mark is registered;
- the disputed mark was not used in the defendant's business documentation or in advertising, or on the Internet;
- the defendant has the right of prior use to the disputed mark;
- the used mark was introduced into the commercial turnover under the plaintiff's permission;
- the usage of the disputed mark was non-commercial;
- the used mark was used in broadcasting or commentaries in news;

- the used mark contains the defendant's name or addresses (in case of a fair use); and
- the statute of limitations has expired.

11.2 What grounds of defence can be raised in addition to non-infringement?

In addition to the non-infringement grounds of defence, a counterclaim may be filed against the trade mark on the following grounds:

- the opposed mark does not meet the requirements for granting legal protection;
- the opposed mark contains elements of, or registered for, goods/services that were not presented in the filed application;
- the rights were granted as the result of the filing of an application in infringement of the rights of other parties;
- the plaintiff's mark has transformed into a designation, which is commonly used as a designation of goods and services of a certain kind (after the filing date of an application); or
- the opposed mark has not been used in Ukraine for five years or more.

12 Relief

12.1 What remedies are available for trade mark infringement?

The remedies available for trade mark infringement are as follows:

- cessation of the disputed mark's use;
- compensation of losses caused by the infringement of the plaintiff's rights;
- removal the disputed mark from the product and/or its packaging;
- liquidation of the produced reproductions of the disputed mark; and
- liquidation of the counterfeit goods.

12.2 Are costs recoverable from the losing party and, if so, how are they determined and what proportion of the costs can usually be recovered?

Yes, it is possible to recover the sued charges from the losing party.

The calculation of the sued charges should be provided to the court and may include, *inter alia*, court fees, forensic examination costs, attorney's fee, etc.

It is worth noting that in order to be accepted, a reasonable calculation of the legal and other professional fees should be submitted to the court. Provision of the documents that confirm payment of such fees is required.

13 Appeal

13.1 What is the right of appeal from a first instance judgment and is it only on a point of law?

A decision of the first instance court may be appealed to the court of appeals. In certain cases, the appeal court's decision can be appealed on cassation.

The appeal court reviews the case on the evidence available, and additional evidence, and verifies the legality and validity of the decision of the first instance court within the framework of the arguments and the requirements of the appeal.

During the cassation appeal, the court only considers whether the substantive and procedural law provisions were broken during the case's consideration.

13.2 In what circumstances can new evidence be added at the appeal stage?

New evidence not submitted to the first instance court is considered by the appeal court only in exceptional instances, if the participant in the case proves that it was impossible to submit it earlier for reasons that were not objectively dependent on him.

14 Border Control Measures

14.1 Is there a mechanism for seizing or preventing the importation of infringing goods or services and, if so, how quickly are such measures resolved?

Yes, the mechanism for seizing and preventing the importation of infringing goods is prescribed by the Ukrainian legislation.

To prevent the importation of infringing goods in the Ukrainian territory, the rights holder may register a trade mark in the Customs Intellectual Property Registry ("Registry").

When the trade mark is entered into the Registry, customs monitor and control the importation and exportation of the goods marked therein. Suspicious shipments are suspended for 10 working days, and the rights holder is simultaneously notified.

Within the suspension term, the rights holder is entitled to inspect the shipment in order to ascertain whether the goods are counterfeited or not.

If the shipment is counterfeit, the rights holder may use the options stated below:

- file a lawsuit;
- initiate administrative proceedings against the infringer;
- initiate the trade mark's removal from the suspended goods and packaging thereof (subject to consent of the shipment owner); or
- initiate destruction of the counterfeited goods (subject to the consent of the shipment owner).

The suspended shipment shall be released if the rights holder undertakes no action within the prescribed term, and no extension of the term by another 10 working days has been claimed.

Preventing the importation of infringing services is not prescribed by Ukrainian legislation.

15 Other Related Rights

15.1 To what extent are unregistered trade mark rights enforceable in your jurisdiction?

According to the Trade Mark Law, a well-known mark protected under the Paris Convention is protected in the same way as if the mark was filed for registration in Ukraine on the date from which the mark is recognised as a well-known mark.

A trade mark may be recognised as well-known by the decision of the Board of Appeals of the MEDTU or as a result of the court proceeding.

Well-known mark protection also extends to goods and services other than the goods and services for which the mark is recognised as well-known (provided that the use of the mark by another person with respect to such goods and services indicates a connection between the latter and the owner of the well-known mark, and there is a risk of the rights holder's interests being damaged due to such a use).

In some cases, it is applicable to enforce an unregistered trade mark based on the unfair competition legislation.

In the case that the company name which is used in Ukraine is identical to the unregistered trade mark, enforcement is also available.

15.2 To what extent does a company name offer protection from use by a third party?

According to the Ukrainian Civil Code, legal protection is given to a company name, if it allows the entity to be distinguished from others and does not mislead consumers about their activity.

The intellectual property right to a commercial name arises from its first use.

The owner of a company name is entitled to:

- use a company name;
- prevent others from using the company name, including the prohibition of such use; and
- other intellectual property rights established by law.

15.3 Are there any other rights that confer IP protection, for instance book title and film title rights?

Ukrainian legislation prescribes that the original titles of books and films are protected as copyright works.

Therefore, it is possible to use a copyright as additional option to rights protection (e.g. unlawful use of the trade mark which is identical to the relevant book or film title).

16 Domain Names

16.1 Who can own a domain name?

Any natural or legal entity is entitled to own a domain name. There is an exception for the top-level domain “.ua”, which is only available to the owner of a trade mark protected in Ukraine (word or combined) or its licensee (the licence agreement should be registered with the MEDTU).

16.2 How is a domain name registered?

For registration of a domain name, it is necessary to contact the domain registrar and pay the respective fee. With regard to the top-level domain “.ua”, the registrant should also provide the trade mark certificate or a licence agreement registered with the MEDTU.

16.3 What protection does a domain name afford per se?

After registration, the owner of the domain name possesses the rights to:

- use the domain name within the allocation period; and
- transfer the rights to the domain to other person.

A third party has a right to initiate a lawsuit against the domain owner in cases where the domain name is identical or is confusingly similar to the registered trade mark.

17 Current Developments

17.1 What have been the significant developments in relation to trade marks in the last year?

At the end of 2018, the agreement between WIPO and Hostmaster, the administrator of the Ukrainian “.ua” domain, on the application of the Uniform Domain-Name Dispute-Resolution Policy (UDRP) to the “.ua” country-code top-level domain (ccTLD), was concluded.

It is expected that the first “.ua” domain cases may be considered by the WIPO Arbitration and Mediation Center in the first half of 2019.

The UDRP initially will be applicable only to second-level private domain names (e.g. “name.ua”), which can be registered only by trade mark owners and on condition that the domain name coincides with the respective trade mark registration valid in Ukraine.

The UDRP application to third-level private domain names (e.g. “name.com.ua”, “name.kiev.ua”, etc.) is expected to be launched during the second half of 2019.

17.2 Please list three important judgments in the trade marks and brands sphere that have been issued within the last 18 months.

One of the most important judgments in the trade marks and brands sphere was a Ruling of the Supreme Court on February 20, 2018 in case No. 922/3136/16 on invalidation of the trade mark “DiskontPlace” on the ground that it is similar, to a grade of confusion, to the plaintiff's trade mark “EconomiClass”. The Supreme Court assessed the similarity of signs and denied the claim, in particular, due to the lack of grounds for appointment of the examination. The Supreme Court noted that, in this case, the need for the use of special knowledge is not available, since the resolution of the issue raised (as to the similarity between the trade marks) falls within the competence of the “ordinary average consumer” of the relevant services.

The Golosiivsky district court of Kyiv city, on March 20, 2018, obliged all Internet providers of Ukraine to close access to websites that offer products marked with the trade mark “MIELE” in the framework of the pre-trial investigation of a criminal case. It is noteworthy that this was the first judicial order for the blocking of websites by all Internet providers of the country.

The Kyiv district court of Poltava city, on November 29, 2017, in case No. 552/561/17, granted the claim and ordered the prohibition of the illegal use of the trade mark, as well as the recovery of 100,000 hryvnias from the defendant as compensation for moral damage caused to the trade mark owner.

17.3 Are there any significant developments expected in the next year?

Within the judicial reform launched in 2015, the establishment of the specialised High Court on Intellectual Property Matters as a court of first instance and appeal for copyright, trade mark and patent disputes is anticipated in 2019. Decisions of the appeals instance of the noted court will be appealed to the Supreme Court, which is the court of cassation.

17.4 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

Ukraine is facing a major change in its IP system. The proposed changes are currently subject to public discussion. The most discussed issue relating to trade marks is the exhaustion regime.

While the Trade Mark Law was not harmonised with the provisions of the EU–Ukraine Association Agreement, the provisions of the latter are directly applicable. For example, the term of trade mark non-use is five years for revocation actions.



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Maksym Kravchenko is an experienced Ukrainian Trade Mark and Design Attorney and IP lawyer best known for his tailored solutions in resolving a wide range of issues related to trade mark and industrial design prosecution, pre-trial settlement and dispute resolution. He has achieved great results for clients at all levels in overcoming provisional refusals of trade mark protection, objections against trade mark protection, availability searches, representation before the Appeals Chamber of the Patent and Trade Mark Office, and enforcement of IP rights.

A proven track record and steady rate of success, achieved over years of practice in the Ukrainian government and leading Ukrainian IP firms (since 2009), allow Maksym to successfully represent clients in such industries as life sciences and healthcare, agriculture, retail, and consumer goods.



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